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TESTIMONY OF

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Before the

SUBCOMMITTEE ON FINANCIAL INSTITUTIONS AND CONSUMER CREDIT

of the

COMMITTEE ON FINANCIAL SERVICES

of the

U. S. HOUSE OF REPRESENTATIVES

March 27, 2003

Statement required by 12 U.S.C. 250:

The views expressed herein are those of the Office of the Comptroller of the Currency and do not necessarily represent the views of the President.

Introduction

Chairman Bachus, Ranking Member Sanders, and members of the Subcommittee,
I appreciate this opportunity to appear before you again to discuss with you ways in which we can reduce unnecessary regulatory burden on America's banking system, and to express the views of the Office of the Comptroller of the Currency (OCC) on H.R. 1375, the Financial Services Regulatory Relief Act of 2003 (FSRR Act). Let me also thank Congresswoman Capito, for again sponsoring a bill that includes sensible and appropriate regulatory burden relief for national banks and other financial institutions.

Many of the provisions in the FSRR Act were also in H.R. 3951, the financial services regulatory relief legislation which was prepared for Floor action in the House last year after being reported by the Committee on Financial Services. I want to thank the Committee for including almost all of the items suggested by the OCC in these bills. In addition to the provisions that were in H.R. 3951, the FSRR Act also includes some important new amendments that will advance the goal of reducing unnecessary burdens and costs on our nation's banks.

Effective bank supervision demands that regulators achieve a balance between promoting and maintaining the safety and soundness of the banking system and fostering banks' ability to conduct their business profitably and competitively. This is only possible if banks are free from burdensome constraints that are not necessary to further the purposes of the banking laws or to protect safety and soundness. Unnecessary burdens drive up the costs of doing business for banks and their customers and prevent banks from effectively serving the public. Periodic review of the banking statutes and regulations is an essential means of ensuring that banks are not needlessly encumbered by requirements that are no longer appropriate for today's banking environment.

The OCC has a continuing commitment to review its regulations and make changes, consistent with safety and soundness, to enable banks to keep pace with product innovation, new technologies, and changing consumer demand. We constantly reassess the effectiveness and efficiency of our supervisory processes to focus our efforts on the institutions and activities that present the greatest risks, and to reduce unnecessary burdens on demonstrably well-run banks. An exciting new development in this regard is the OCC's new "E-corp" system, which enables national banks to file their corporate applications electronically. Using National BankNet, the OCC's internet-based system for national banks, national banks can now file new branch and branch relocation applications electronically. We will be adding more applications to the system on a rolling basis.

In addition, we also are currently working with the other banking agencies to prepare for the regulatory review required under section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996. Section 2222 requires the Federal Financial Institutions Examination Council and each Federal banking agency to conduct a review of all regulations every 10 years to identify outdated, unnecessary regulatory requirements. We and the other Federal banking agencies have identified our teams for this project and our work is already underway.

However, the results that Congress can achieve today by removing or reducing regulatory burden imposed by Federal statutes can be broader and more far-reaching than regulatory changes that we can make under the current law. The FSRR Act contains a number of important provisions that will help banks remain profitable and competitive by eliminating unnecessary burden. My testimony will highlight several of these provisions.[1]

The FSRR Act also contains provisions that further our ability to promote and maintain the safety and soundness of the banking system. I will mention a few of these provisions in my testimony. I will also take this opportunity to briefly discuss our suggestions to improve some of the provisions in the FSRR Act and our recommendations for additional changes that you may wish to consider as the legislation advances.

National Bank Provisions

The FSRR Act contains several provisions that would streamline and modernize aspects of the corporate governance and interstate operations of national banks. The OCC strongly supports these provisions.

For example, section 101 of the Act relieves a restriction in current law that impedes the ability of national banks to operate as "Subchapter S" corporations. The National Bank Act currently requires all directors of a national bank to own at least $1,000 worth of shares of that bank or an equivalent interest in a bank holding company that controls the bank. The requirement means that all directors must be shareholders, making it difficult or impossible for some banks to comply with the 75-shareholder limit that defines eligibility for treatment as a Subchapter S corporation. These banks are thus ineligible for the benefit of Subchapter S tax treatment, which avoids a double tax on the bank's earnings. Community banks suffer most from this result.

Section 101 authorizes the Comptroller to permit the directors of banks seeking Subchapter S status to satisfy the qualifying shares requirement by holding a debt instrument that is subordinated to the amounts owed by the bank to its depositors and general creditors. The holding of such an instrument would not cause a director to be counted as a shareholder for purposes of Subchapter S. The subordinated liability has features resembling an equity interest, however, since the directors could only be repaid if all other claims of depositors and nondeposit general creditors of the bank were first paid in full, including the claims of the FDIC, if any. The new requirement would thus ensure that directors retain the requisite personal stake in the financial soundness of their bank, but yet would allow the bank to take advantage of Subchapter S tax treatment.

Similarly, section 102 of the Act eliminates a requirement in current law that precludes a national bank from prescribing, in its articles of association, the method for election of directors that best suits its business goals and needs. Unlike most other companies and state banks, national banks cannot choose whether or not to permit cumulative voting in the

[1] A detailed section-by-section review of the provisions of Title I, IV, and VI of the FSRR Act that are relevant to the OCC's responsibilities is attached to this testimony as an appendix.

election of their directors. Instead, current law requires a national bank to permit its shareholders to vote their shares cumulatively. Section 102 provides that a national bank's articles of association may permit cumulative voting. This amendment would conform the National Bank Act to modern corporate codes and provide national banks with the same corporate flexibility available to most corporations and state banks.

An important new provision that was added to FSRR Act is section 110. This provision is strongly supported by the OCC and clarifies that the OCC may permit a national bank to organize in any business form, in addition to a "body corporate." An example of an alternative form of organization would be a limited liability national association, comparable to a limited liability company. The provision also clarifies that the OCC's rules will provide the organizational characteristics of a national bank operating in an alternative form, consistent with safety and soundness. Except as provided by these organizational characteristics, all national banks, notwithstanding their form of organization, will have the same rights and privileges and be subject to the same restrictions and enforcement authority.

Allowing a national bank to choose the business form that is most consistent with the banks' business plans improves the efficiency of a national bank's operations. For example, if the OCC should permit a national bank to organize as a limited liability national association, this may be a particularly attractive option for community banks. The bank may then be able to take advantage of the pass-through tax treatment for comparable limited liability entities under certain tax laws and eliminate double taxation under which the same earnings are taxed both at the corporate level as corporate income and at the shareholder level as dividends. Some states currently permit state banks to be organized as unincorporated limited liability companies (LLCs) and the FDIC recently adopted a rule that allows certain state bank LLCs to qualify for Federal deposit insurance. This amendment would clarify that the OCC can permit national banks to organize in an alternative business form, such as an LLC.

Section 401 of the Act also simplifies the requirements that apply to a national bank that wishes to expand interstate by establishing branches *de novo*. Under the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, interstate expansion through bank mergers generally is subject to a state "opt-out" that had to be in place by June 1, 1997. Under the time frames set by the statute, interstate bank mergers were permissible in all 50 states as of September 2001. By contrast, *de novo* branching still requires states to pass legislation to affirmatively "opt-in" to permit out-of-state banks to establish new branches in the state. Some states have done so, generally conditioning such *de novo* branching on reciprocal *de novo* branching being allowed by the home state of the bank proposing to branch in such a state.

The effect of current law is to require that, in many cases, banks must structure artificial and unnecessarily expensive transactions in order to establish a new branch across a state border -- which in some cases, is simply across town in a multi-state metropolitan area. Section 401 repeals the requirement that a state must adopt an express "opt-in" statute to permit the *de novo* branching form of interstate expansion for national banks and contains parallel provisions for state member and non-member banks. Both state and national banks and their customers would benefit significantly by this change, which would permit a bank to freely choose which form of interstate expansion is most efficient for its needs and customer demands. In today's internet age, when customers can communicate remotely with banks located in any state, restrictions on where a bank may establish "branch" facilities to directly serve customers are an unnecessary legacy from a protectionist era that detract from healthy competition and customer service.

Federal Branches and Agencies of Foreign Banks

The OCC also licenses and supervises Federal branches and agencies of foreign banks. Federal branches and agencies generally are subject to the same rights and privileges, as well as the same duties, restrictions, penalties, liabilities, conditions and limitations and laws that apply to national banks. Thus, Federal branches and agencies will benefit equally from the provisions in the FSRR Act that reduce burden on national banks. Branches and agencies of foreign banks, however, also are subject to other requirements under the International Banking Act of 1978 (IBA) that are unique to their organizational structure and operations in the U.S. as an office of a foreign bank. The FSRR Act also includes provisions amending the IBA that are intended to reduce certain unnecessary burdens on Federal branches and agencies. We are supportive of these efforts. However, we believe that one of the provisions can be improved to achieve the full benefits of burden reduction and to preserve national treatment with national banks.

Section 107 provides that the OCC can set the capital equivalency deposit (CED) requirements for a Federal branch or agency as necessary to protect depositors and other investors and to be consistent with safety and soundness. However, that amount cannot be less than the amount required by a state for a state-licensed branch or agency in which the Federal branch or agency is located. This approach is a substantial improvement over the inflexibility of the current law. However, the CED requirements could be made even more risk-focused. The OCC has provided the Committee with an alternate that allows the OCC, after consultation with the Federal Financial Institutions Examination Council, to adopt regulations allowing the CED to be set on a risk-based institution-by-institution basis. Such an approach would more closely resemble the risk-based capital framework that applies to both national and state banks.

Information Sharing With Foreign Supervisors

A new provision added to the bill will be particularly helpful to the OCC and the other banking agencies in negotiating information sharing agreements with foreign supervisors. Section 610 clarifies that the OCC, Federal Reserve Board, FDIC, and OTS cannot be compelled to disclose information obtained from a foreign regulator under an information sharing agreement, or pursuant to other lawful procedures, if public disclosure of the information would cause the foreign authority to violate foreign law. However, nothing in this provision would allow the agency to withhold information from Congress or prevent the agency from complying with a court order in an action commenced by the United States or the agency. This clear statement in the law will facilitate information sharing and will provide foreign supervisors with assurances that public disclosure of confidential supervisory information will be limited in cases in which such disclosures will violate foreign laws.

Safety and Soundness Provisions

The FSRR Act also contains a number of provisions that further the objective of promoting and maintaining the safety and soundness of the banking system. One of the most important of these provisions is section 405, which expressly authorizes the Federal banking agencies to enforce written agreements and conditions imposed in writing in connection with an application or when the agency imposes conditions as part of its decision not to disapprove a notice, *e.g.*, a Change in Bank Control Act (CBCA) notice.

This provision also would supersede recent Federal court decisions that conditioned the agencies' authority to enforce such conditions or agreements on a showing that the non-bank party to the agreement was "unjustly enriched." Section 405 also contains a valuable measure that clarifies that controlling parties and affiliates of banks many not evade their capital commitments to the bank through bankruptcy. These changes will enhance the safety and soundness of depository institutions and protect the deposit insurance funds from unnecessary losses. Finally, as stated earlier, this section also clarifies the banking agencies' authority to impose and enforce conditions in connection with the agency's decision not to object to a CBCA or other notice.

The Act also contains another provision that promotes safety and soundness by providing the Federal banking agencies with greater flexibility to manage resources more efficiently and deal more effectively with problem situations. Current law mandates that most banks be examined on-site on prescribed schedules. This can, in certain circumstances, interfere with the ability of the banking agencies to concentrate their supervisory oversight on the most problematic institutions. Section 601 of the bill would permit the agencies, when necessary for safety and soundness purposes, to adjust their mandatory examination schedules to concentrate resources on particularly troubled or risky institutions.

We also recommend that we and the other banking agencies have more flexibility in assigning our examiners to particular institutions. To further that goal, the banking agencies worked together to develop an amendment that broadly addresses particular ethical issues facing our examiners and we thank the Committee for including this provision in section 613 of the bill. Current law provides that criminal penalties may be imposed on a Federal bank examiner who examines a bank from which the examiner receives an extension of credit, including a credit card issued by that institution. The financial institution that extends such credit to the examiner also is subject to criminal penalties. This limits the flexibility of the OCC and the other banking agencies to assign examiners to particular institutions or examination teams, even if the extension of credit is on the bank's customary terms and the examiner's skills or expertise would contribute materially to the examination.

Section 613 provides that the Federal financial institutions regulatory agencies, including the Federal banking agencies, may grant exemptions from the prohibition to their examiners by regulation or on a case-by-case basis if an extension of credit would not affect the integrity of the examination. The agencies must consult with each other in developing regulations providing for the exemptions and case-by-case exemptions only may be granted after applying certain specific factors. In addition, the amendment expressly provides that examiners may have credit cards without disqualification or recusal, but subject to the safeguard that the cards must be issued under the same terms and conditions as cards issued to the general public.

Section 603 of the FSRR Act also improves the Federal banking agencies' ability to keep bad actors out of our nation's depository institutions. This provision gives the Federal banking agencies the authority to prohibit a person convicted of a crime involving dishonesty, breach of trust, or money laundering from participating in the affairs of an uninsured national or state bank or uninsured branch or agency of a foreign bank without the consent of the agency. Under current law, the ability to keep these bad actors out of depository institutions applies only to *insured* depository institutions. Sec. 611 further would amend the law to provide the Federal Reserve Board with the authority to keep persons convicted of these offenses from participating in the affairs of a bank holding company or its nonbank subsidiaries, or an Edge or Agreement corporation. To further strengthen this authority, we recommend that this provision be expanded to clarify that the Federal banking agencies also can prohibit these persons from participating in the affairs of nonbank subsidiaries of the banks that we supervise.

Two other important new provisions have been added to the FSRR Act to promote safety and soundness. These provisions were developed on an interagency basis by the Federal banking agencies and, in my testimony last year, I recommended that these provisions be included in the bill.

First, under current law, independent contractors for insured depository institutions are treated more leniently under the enforcement provisions in the banking laws than are directors, officers, employees, controlling shareholders, or even agents for the institution or shareholders, consultants, and joint venture partners who participate in the affairs of the institution (institution-affiliated parties). To establish that an independent contractor, such as an accountant, has the type of relationship with the insured depository institution that would allow a Federal banking agency to take action against the accountant for a violation of law, breach of fiduciary duty, or an unsafe or unsound banking practice, the banking agency must show that the accountant "knowingly and recklessly" participated in such a violation. This standard is so high that it is extremely difficult for the banking agencies to take enforcement actions against accountants and other contractors who engage in wrongful conduct. Section 614 of the FSRR Act removes the "knowing and reckless" requirement to hold independent contractors to a standard that is more like the standard that applies to other institution-affiliated parties.

Second, section 409 amends the CBCA to address issues that have arisen for the banking regulators when a stripped-charter institution (*i.e.,* an insured bank that has no ongoing business operations because, for example, all of the business operations have been transferred to another institution) is the subject of a change-in-control notice. The agencies' primary concern with such CBCA notices is that the CBCA is sometimes used as a way to acquire a bank with deposit insurance without submitting an application for a *de novo* charter and an application for deposit insurance. In general, the scope of review of a *de novo* charter application or deposit insurance application is more comprehensive than the statutory grounds for denial of a notice under the CBCA. There also are significant differences between the application and notice procedures. In the case of an application, the banking agency must affirmatively approve the request before a transaction can be consummated. Under the CBCA, if the Federal banking agency does not act to disapprove a notice within certain time frames, the acquiring person may consummate the transaction. In the case of a CBCA notice to acquire a stripped-charter institution, acquirers are effectively buying a bank charter without the scope of review that the law imposes when applicants seek a new charter, even though the risks presented by the two sets of circumstances may be substantively identical. To address these concerns, section 409 of the FSRR Act expands the criteria in the CBCA that allow a Federal banking agency to extend the time period to consider a CBCA notice so that the agency may consider business plan information and would allow the agency to use that information in determining whether to disapprove the notice.

Additional Suggestion To Improve Information Sharing

Another item that we recommend be included in the bill is an amendment that would permit all of the Federal banking agencies -- the OCC, FDIC, OTS, and the Federal Reserve Board -- to establish and use advisory committees in the same manner. Under current law, only the Board is exempt from the public disclosure requirements of the Federal Advisory Committee Act (FACA). The OCC, FDIC, and OTS, however, also supervise insured depository institutions and these institutions and their regulators have the same need to share information and to be able to conduct open and frank discussions about important supervisory and policy issues. Because of the potentially sensitive nature of this type of information, the public meeting and disclosure requirements under FACA could inhibit the supervised institutions from providing the OCC, FDIC, or OTS with their candid views. Our amendment would enhance the free exchange of information between all depository institutions and their Federal bank regulators with resulting safety and soundness benefits.

Bank Parity with Special Provisions for Thrifts

Finally, I note that the bill contains provisions providing beneficial treatment to Federal thrifts in areas where there is no reason to particularly distinguish Federal thrifts from national banks or State banks. These provisions include section 213 (Federal court diversity jurisdiction determined only on the basis of where an institution has its main office, eliminating consideration of where it has its principal place of business) and section 503 (eliminating geographic restrictions on thrift service companies). Similar issues may exist with respect to some of the other sections. The nature of these provisions is such that, if they are considered appropriate by the Subcommittee, there is no basis not to make them applicable to banks as well as thrifts.

Conclusion

Once again, Mr. Chairman, on behalf of the OCC, I thank you for your leadership in pursuing this legislation. As I have indicated, the OCC supports the Act and believes that many of its provisions will go far to promote the objectives I have described today. In the areas in which we have recommended that you consider additional improvements, we would be pleased to work with your staff to develop appropriate legislative language for the Subcommittee's consideration.

I am pleased to have had this opportunity to provide our views on this important initiative, and I would be happy to answer any questions you may have.

APPENDIX

H.R. 1375
"THE FINANCIAL SERVICES REGULATORY RELIEF ACT OF 2003"

SUMMARY AND COMMENTS OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY ON TITLES I, IV, AND VI

TITLE I -- NATIONAL BANK PROVISIONS

Sec. 101. National Bank Directors.

SUMMARY: This section would amend section 5146 of the Revised Statutes of the United States (12 U.S.C. § 72) to provide more flexible requirements regarding director qualifying shares for national banks operating, or seeking to operate, as Subchapter S corporations. The National Banking Act currently requires all directors of a national bank to own "shares of the capital stock" of the bank having an aggregate par value of at least $1,000, or an equivalent interest, as determined by the Comptroller, in a bank holding company that controls the bank. The amendment would permit the Comptroller to allow the use of a debt instrument that is subordinated to the interests of depositors, the Federal Deposit Insurance Corporation (FDIC), and other general creditors to satisfy the qualifying shares requirement for directors of national banks seeking to operate in Subchapter S status.

OCC COMMENTS: The OCC supports this change to the law. The requirement in current law creates difficulties for some national banks that operate in Subchapter S form. It effectively requires that all directors be shareholders, thus making it difficult or impossible for some banks to comply with the 75-shareholder limit that defines eligibility for the benefit of Subchapter S tax treatment, which avoids double tax on the bank's earnings. Such a subordinated debt instrument would have features resembling an equity interest, since the directors could only be repaid if all other claims of depositors and nondeposit creditors of the bank were first paid in full, including the FDIC's claims, if any. It would thus ensure that directors retain their personal stake in the financial soundness of the bank. However, the holding of such an instrument would not cause a director to be counted as a shareholder for purposes of Subchapter S.

Sec. 102. Voting in Shareholder Elections.

SUMMARY: This section would amend section 5144 of the Revised Statutes of the United States (12 U.S.C. § 61). Section 5144 imposes mandatory cumulative voting requirements on all national banks. This law currently requires that, in all elections of national bank directors, each shareholder has the right to (1) vote for as many candidates as there are directors to be elected and to cast the number of votes for each candidate that is equal to the number of shares owned, or (2) cumulate his or her votes by multiplying the number of shares owned by the number of directors to be elected and casting the total number of these votes for only one candidate or allocating them in any manner among a number of candidates. This amendment would permit a national bank to provide in its articles of association which method of electing its directors best suits its business goals and needs and would provide the OCC with authority to issue regulations to carry out the purposes of this section.

OCC COMMENTS: The OCC supports this change to national banking law. The Model Business Corporation Act and most states' corporate codes provide that cumulative voting is optional. This amendment would conform this provision of the National Bank Act to modern corporate codes and would provide national banks with the same corporate flexibility available to most state corporations and state banks.

Sec. 103. Simplifying Dividend Calculations for National Banks.

SUMMARY: This section would amend section 5199 of the Revised Statutes of the United States (12 U.S.C. § 60) to simplify the formula for calculating the amount that a national bank may pay in dividends. The current law requires banks to follow a complex formula that is unduly burdensome and unnecessary for safety and soundness. The proposed amendment would retain certain safeguards in the current law that provide that national banks (and state member banks)[1] need the approval of the Comptroller (or the Federal Reserve Board (FRB) in the case of state member banks) to pay a dividend that exceeds the current year's net income combined with any retained net income for the preceding two years. For purposes of the approval requirement, these Federal regulators would retain the authority to reduce the amount of a bank's "net income" by any required transfers to funds, such as a sinking fund for retirement of preferred stock.

OCC COMMENTS: The OCC supports this amendment. The amendment would reduce burden on banks in a manner that is consistent with safety and soundness. Among other things, the amendment would ensure that the OCC (and the FRB for state member banks) will continue to have the opportunity to deny any dividend request that may deplete the net income of a bank that may be moving towards troubled condition. Importantly, the amendment would not affect other safeguards in the National Bank Act (12 U.S.C. 56). These provisions generally prohibit national banks from withdrawing any part of their permanent capital or paying dividends in excess of undivided profits except in certain circumstances.

Moreover, other safeguards, such as Prompt Corrective Action, have been enacted in the last ten years that provide additional safety and soundness protections for all insured depository institutions. The proposed amendment would not affect the applicability of these safeguards. These additional safeguards prohibit any insured depository institution from paying any dividend if, after that payment, the institution would be undercapitalized (see 12 U.S.C. § 1831o(d)(1)).

[1] See 12 U.S.C. 324 and 12 C.F.R. 208.5 generally applying the national bank dividend approval requirements to state member banks.

Sec. 104. Repeal of Obsolete Limitation on Removal Authority of the Comptroller of the Currency.

SUMMARY: This provision amends section 8(e)(4) of the Federal Deposit Insurance Act (FDIA) (12 U.S.C. § 1818(e)(4)) relating to the procedures for the removal of an institution-affiliated party (IAP) from office or participation in the affairs of an insured depository institution. With respect to national banks, current law requires the OCC to certify the findings and conclusions of an Administrative Law Judge to the FRB for the FRB's determination as to whether any removal order will be issued. This amendment would remove this certification and FRB approval process and allow the OCC directly to issue the removal order with respect to national banks.

OCC COMMENTS: The OCC supports this amendment. This present system stems from historical decisions made by Congress on circumstances that are no longer applicable. Originally, the role of the OCC in removal cases was to certify the facts of the case to the FRB. The FRB then made the decision to pursue the case and made the final agency decision. At that time, the Comptroller was a member of the FRB and therefore participated in the FRB's final removal decision. However, Congress later removed the Comptroller from the FRB and gave the OCC the authority to issue suspensions and notices of intention to remove.

All of the Federal banking agencies, except the OCC, may remove a person who engages in certain improper conduct from the banking business. In the case of the OCC, the determination of whether to remove an individual from a national bank (and thus from the banking business) is made by the FRB. This amendment would give the Comptroller the same removal authority as the other banking agencies to issue orders to remove persons who have been determined under the statute to have, for example, violated the law or engaged in unsafe or unsound practices in connection with an insured depository institution. Like the other banking agencies, the Comptroller should make these decisions about persons who engage in improper conduct in connection with the institutions for which the Comptroller is the primary supervisor. This is a technical change to streamline and expedite these actions and has no effect on a person's right to seek judicial review of any removal order. The FRB also supports this amendment.

Sec. 105. Repeal of Intrastate Branch Capital Requirements.

SUMMARY: This provision would amend section 5155(c) of the Revised Statutes of the United States (12 U.S.C. § 36(c)) to repeal the requirement that a national bank, in order to establish an intrastate branch in a state, must meet the capital requirements imposed by the state on state banks seeking to establish intrastate branches.

OCC COMMENTS: The OCC supports this technical amendment to repeal the obsolete capital requirement for the establishment of intrastate branches by national banks. This amendment passed the House on October 9, 1998 in Sec. 306 of H.R. 4364, the Depository Institution Regulatory Streamlining Act of 1998, and was also included in later legislation introduced in the House. This requirement is not necessary for safety and soundness. Branching restrictions are already imposed under other provisions of law to limit the operations of a bank if it is in troubled condition. See 12 U.S.C. § 1831o(e) (prompt corrective action).

Sec. 106. Clarification of Waiver of Publication Requirements for Bank Merger Notices.

SUMMARY: This section would amend sections 2(a) and 3(a)(2) of the National Bank Consolidation and Merger Act (12 U.S.C. § 215(a) and 215a(a)(2), respectively) concerning the newspaper publication requirement of a shareholder meeting to vote on a consolidation or merger of a national bank with another bank located within the same state. This change would clarify that the publication requirement may be waived by the Comptroller in the case of an emergency situation or by unanimous vote of the shareholders of the national or state banks involved in the transaction.

This amendment does not affect other requirements in the law. The current law also requires that the consolidation or merger must be approved by at least a 2/3 vote of the shareholders of each bank involved in the transaction. In addition, the shareholders of the banks generally must receive notice of the meeting by certified or registered mail at least ten days prior to the meeting. These provisions are not changed.

OCC COMMENTS: The OCC supports this amendment. The amendment would clarify the intent of the statute and remove any ambiguity as to its meaning.

Sec. 107. Capital Equivalency Deposits for Federal Branches and Agencies of Foreign Banks.

SUMMARY: This section would amend section 4(g) of the International Banking Act of 1978 (IBA) (12 U.S.C. § 3102(g)) with respect to the Comptroller's authority to set the amount of the capital equivalency deposit (CED) for a Federal branch or agency. The CED is intended to ensure that assets will be available in the U.S. for creditors in the event of liquidation of a U.S. branch or agency. The current CED statute that applies to foreign banks operating in the U.S. through a Federal license may impose undue regulatory burdens without commensurate safety and soundness benefits. These burdens include obsolete requirements about where the deposit must be held and the amount of assets that must be held on deposit. As a practical matter, the IBA sets the CED at 5% of total liabilities of the Federal branch or agency and provides that the CED must be maintained in such amount as determined by the Comptroller. As a result, Federal branches and agencies often must establish a CED that is larger than the capital that would be required for a bank of corresponding size or for a similar size State-chartered foreign branch or agency in major key States.

Section 107 provides that the OCC can set the CED requirements for a Federal branch or agency as necessary to protect depositors and other investors and to be consistent with safety and soundness. However, that amount cannot be less than the amount required by a state for a state-licensed branch or agency in the state in which the Federal branch or agency is located.

OCC COMMENTS: Section 107 represents a substantial improvement over the inflexibility of current law; however, the CED standards could be made even more risk-focused. Last year and again this year the OCC provided the Committee with an amendment that allows the OCC, after consultation with the Federal Financial Institutions Examination Council (FFIEC), to adopt regulations allowing the CED to be set on a risk-based institution-by-institution basis. Such an approach would more closely resemble the risk-based capital framework that applies to national and state banks. The FRB has no objections to the OCC's amendment.

Sec. 108. Equal Treatment for Federal Agencies of Foreign Banks.

SUMMARY: This section would amend section 4(d) of the IBA (12 U.S.C. § 3102(d)) to provide that the prohibition on uninsured deposit-taking by Federal agencies of foreign banks applies only to deposits from U.S. citizens or residents. As a result, a Federal agency would be able to accept uninsured foreign source deposits from non-U.S. citizens. State agencies of foreign banks may accept uninsured deposits from parties who are neither residents nor citizens of the United States, if so authorized under state law. However, due to slight language differences in the IBA, the D.C. Circuit Court of Appeals has held that Federal agencies cannot accept any deposits, including those from noncitizens who reside outside of the United States. Conference of State Bank Supervisors v. Conover, 715 F.2d 604, 623 (D.C. Cir. 1983).

OCC COMMENTS: The OCC supports this amendment. This amendment would allow Federal agencies to accept the limited *uninsured* foreign source deposits that state agencies may accept under the IBA. As a result, the amendment would repeal an unnecessary regulatory burden that has competitively disadvantaged Federal agencies and prevented them from offering the same services to foreign customers that may be offered by state agencies. Because these deposits are not insured, this amendment does not pose any risks to the deposit insurance fund.

Sec. 109. Maintenance of a Federal Branch and a Federal Agency in the Same State.

SUMMARY: This section would amend section 4(e) of the IBA (12 U.S.C. § 3102(e)) to provide that a foreign bank is prohibited from maintaining both a Federal agency and a Federal branch in the same state only *if* state law prohibits maintaining both an agency and a branch in the state. Current law prohibits a foreign bank from operating both a Federal branch and a Federal agency in the same state notwithstanding that state law may allow a foreign bank to operate both types of offices.

OCC COMMENTS: The OCC supports this change. According to the legislative history of the current provision, this prohibition was included in the IBA to maintain parity with state operations. However, today some states permit foreign banks to maintain both a branch and agency in the same state. Florida law permits a foreign bank to operate more than one agency, branch, or representative office in Florida (*see* Fla. Stat. Ann. § 663.06). Other states, such as Connecticut, also may permit a foreign bank to have both a state branch and a state agency (*see* Conn. Gen. Stat. Ann. § 36a-428). This amendment would repeal an outdated regulatory burden in current law and permit a foreign bank to maintain both a Federal branch and a Federal agency in those states that do not prohibit a foreign bank from maintaining both of these offices. This change would enhance national treatment and give foreign banks more flexibility in structuring their U.S. operations.

Sec. 110. Business Organization Flexibility for National Banks.

SUMMARY: This section would amend the Revised Statutes of the United States (12 U.S.C. § 21 *et seq.*) to clarify the Comptroller's authority to adopt regulations allowing national banks to be organized in different business forms. Notwithstanding the form of organization, however, all national banks would continue to have the same rights and be subject to the same restrictions and requirements except to the extent that differences are appropriate based on the different forms of organization.

OCC COMMENTS: The OCC strongly supports this amendment. This amendment would reduce burden on national banks and allow them to choose among different business organizational forms, as permitted by the Comptroller, and to select the form that is most consistent with the their business plans and operations so that it may operate in the most efficient manner. Certain alternative business structures may be particularly attractive for community banks. For example, if the Comptroller should permit a national bank to be organized as a limited liability national association and establish the characteristics of such a national bank, the bank then may be able to take advantage of the pass-through tax treatment for comparable limited liability entities under certain tax laws and eliminate double taxation under which the same earnings are taxed both at the corporate level as corporate income and at the shareholder level as dividends.

Some states currently permit state banks to be organized as unincorporated limited liability companies (LLCs) and the FDIC recently adopted a rule that will result in certain state bank LLCs being eligible for Federal deposit insurance. Clarifying that national banks also may be organized in alternative business forms will provide a level playing field.

Sec. 111. Clarification of the Main Place of Business of a National Bank.

SUMMARY: This section would amend two sections in the Revised Statutes of the United States (12 U.S.C. §§ 22 and 81). The amendment would replace obsolete language that is used in these two sections with the modern term "main office."

OCC COMMENTS: The OCC supports these technical amendments. The change to 12 U.S.C. § 22 would clarify that the information required to be included in a national bank's organization certificate is the location of its *main office*. The change of 12 U.S.C. § 81 would clarify that the general business of a national bank shall be transacted in its *main office* and in its branch or branches. Both statutes currently use obsolete terms to describe a main office of a national bank.

TITLE IV -- DEPOSITORY INSTITUTION PROVISIONS

Sec. 401. Easing Restrictions on Interstate Branching and Mergers.

SUMMARY: This section would amend section 5155(g) of the Revised Statutes of the United States (12 U.S.C. § 36(g)), section 18(d)(4) of the FDIA (12 U.S.C. § 1828(d)(4)), section 9 of the Federal Reserve Act (12 U.S.C. § 321), and section 3(d)(1) of the Bank Holding Company Act (BHCA) (12 U.S.C. § 1842(d)(1)) to ease certain restrictions on interstate banking and branching. Under the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (Riegle-Neal Act), an out-of-state national or state bank may establish a de novo branch in a state only if that state has adopted legislation affirmatively "opting in" to de novo branching. This amendment would repeal the requirement that a state expressly must adopt an "opt-in" statute to permit the de novo branching form of interstate expansion.

In addition, the Riegle-Neal Act permits a state to prohibit an out-of-state bank or bank holding company from acquiring an in-state bank that has not been in existence for up to five years. This amendment also would repeal the state age requirement.

Also, the amendment would amend the FDIA to authorize consolidations or mergers between an insured bank and a noninsured bank with different home states and amend national banking law relating to consolidations or mergers between noninsured national banks and other noninsured banks with different home states.

OCC COMMENTS: The OCC supports the changes to the law to remove the restrictions on interstate de novo branching. Enactment of this amendment should enhance competition in banking services with resulting benefits for bank customers. Moreover, it will ease burdens on banks that are planning interstate expansion through branches and would give banks greater flexibility in formulating their business plans and in making choices about the form of their interstate operations.

Under the Riegle-Neal Act, interstate expansion through bank mergers generally is subject to a state "opt-out" that had to be in place by June 1, 1997. While two states "opted out" at the time, interstate bank mergers are now permissible in all 50 states. By contrast, de novo branching by banks requires states to pass legislation to affirmatively "opt-in" to permit out-of-state banks to establish new branches in the state. This requires banks in many cases to structure artificial and unnecessarily expensive transactions in order for a bank to simply establish a new branch across a state border. However, Federal thrifts are not similarly restricted and generally may branch interstate without the state law "opt-in" requirements that are imposed on banks.

In addition, the OCC supports the amendments that would repeal the state age requirement. This additional limitation on bank acquisitions by out-of-state banking organizations is no longer necessary if interstate de novo branching is permitted.

Sec. 402. Statute of Limitations for Judicial Review of Appointment of a Receiver for Depository Institutions.

SUMMARY: This provision would amend section 2 of the National Bank Receivership Act (12 U.S.C. § 191) and section 11(c)(7) of the FDIA (12 U.S.C. § 1821(c)(7)) to provide for a 30-day period to judicially challenge a determination by the OCC to appoint a receiver for a national bank under the National Bank Receivership Act or by the FDIC to appoint itself as receiver under the FDIA under certain conditions. Current law generally provides that challenges to a decision by the OTS to appoint a receiver or conservator for an insured savings association or the FDIC to appoint itself as receiver or conservator for an insured state depository institution must be raised within 30 days of the appointment. 12 U.S.C. §§ 1464(d)(2)(B), 1821(c)(7). There is, however, no statutory limit on a national bank's ability to challenge a decision by the OCC to appoint a receiver of an insured or uninsured national bank.[2] As a result, the general six-year statute of limitations for actions against the U.S. applies to the OCC's receiver appointments. See James Madison, Ltd. v. Ludwig, 82 F.3d 1085 (D.C. Cir. 1996).

Moreover, under the FDIA, there are some circumstances under which FDIC may be appointed or appoint itself as receiver or conservator for an insured depository institution that are not specifically subject to the general 30-day judicial review period. As a technical matter, the amendment also would harmonize these provisions in the FDIA with the general 30-day rule.

Finally, the amendment would provide that the changes made in the statute of limitations under these provisions applies with respect to conservators, receivers, or liquidating agents appointed on or after the date of enactment of the new law.

OCC COMMENTS: The OCC supports this amendment to national banking law. This amendment passed the House on October 9, 1998 in Sec. 304 of H.R. 4364, the Depository Institution Regulatory Streamlining Act of 1998, and was also included in later legislation introduced in the House. The six-year protracted time period under current law severely limits the OCC's authority to manage insolvent national banks that are placed in receivership by the agency and the ability of the FDIC to wind up the affairs of an insured national bank in a timely manner with legal certainty. (In the case of an insured national bank that is placed in receivership by the OCC, the FDIC must be appointed the receiver.) This amendment would make the statute of limitations governing the appointment of receivers of national banks consistent with the time period that generally applies to other depository institutions. The amendment would not affect a national bank's ability to challenge a decision by the OCC to appointment a receiver, but simply require that these challenges must be brought in a timely manner and during the same time frame that generally applies to other depository institutions.

Sec. 403. Reporting Requirements Relating to Insider Lending.

SUMMARY: This provision would amend section 22(g) of the Federal Reserve Act (12 U.S.C. § 375a) and section 106(b)(2) of the Bank Holding Company Act Amendments of 1970 (12

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[2] Under current law, there is a 20-day statute of limitations for challenges to the OCC's decision to appoint a conservator of a national bank. 12 U.S.C. § 203(b)(1).

U.S.C. § 1972(2)) to eliminate certain reporting requirements concerning loans made to insiders. Specifically, the reports that would be eliminated are (1) the report that must be filed with a bank's board of directors when an executive officer of the bank obtains certain types of loans from another bank that exceeds the amount the officer could have obtained from his or her own bank, (2) the supplemental report a bank must file with its quarterly call report identifying any loans made to executive officers during the previous quarter, and (3) an annual report filed with a bank's board of directors by its executive officers and principal shareholders regarding outstanding loans from correspondent banks.

OCC COMMENTS: The OCC supports these amendments. Nothing in these amendments affects the insider lending restrictions that apply to national banks or the OCC's enforcement of those restrictions. Moreover, the OCC believes that it will continue to have access to sufficient information during the examination process to review a national bank's compliance with the insider lending laws. Under the OCC's regulations, national banks are required to follow the FRB's regulations regarding insider lending restrictions and reporting requirements (see 12 C.F.R. § 31.2). The FRB's regulations require member banks to maintain detailed records of all insider lending. In addition, the OCC has the authority under 12 U.S.C. § 1817(k) to require any reports that it deems necessary regarding extensions of credit by a national bank to any of its executive officers or principal shareholders, or the related interests of such persons.

Sec. 404. Amendment to Provide an Inflation Adjustment for the Small Depository Institution Exception under the Depository Institution Management Interlocks Act.

SUMMARY: This provision would amend section 203(1) of the Depository Institutions Management Interlock Act (DIMIA) (12 U.S.C. § 3202(1)). Under current law, generally a management official may not serve as a management official of any other nonaffiliated depository institution or depository institution holding company if (1) their offices are located or they have an affiliate located in the same MSA, or (2) the institutions are located in the same city, town, or village, or a city, town, or village that is contiguous or adjacent thereto. For institutions of less than $20 million in assets, the SMSA restriction does not apply. The amendment would increase the current $20 million exemption to $100 million.

OCC COMMENTS: The OCC supports this amendment. This $20 million cap has not been amended since the current law was originally enacted in 1978. However, the asset size of FDIC-insured commercial banks between 1976 and 2000 has increased over five fold. Depository institutions of all sizes will continue to be subject to the city, town, or village test.

Sec. 405. Enhancing the Safety and Soundness of Insured Depository Institutions.

SUMMARY: This provision would add a new section to the FDIA (12 U.S.C. § 1811, et seq.) to provide that the Federal banking agencies may enforce the terms of (1) conditions imposed in writing in connection with an application, notice, or other request, and (2) written agreements. The amendment also would clarify the existing authority of the FDIC as receiver or conservator to enforce written conditions or agreements entered into between insured depository institutions and IAPs.

Finally, the amendment would amend section 18(u) of the FDIA (12 U.S.C. § 1828(u)). This section of the law provides that certain transfers to depository institutions to bolster their capital cannot be reversed under the Bankruptcy Code or other law if the affiliate or controlling shareholder making the transfer later becomes bankrupt. The amendment would delete the requirement that the insured depository institution had to be undercapitalized at the time of the transfer for the transfer to be protected under this provision.

<u>OCC COMMENTS</u>: The OCC supports these changes to the law. This amendment enhances the safety and soundness of depository institutions and protects the deposit insurance funds from unnecessary losses. This amendment is intended to reverse some court decisions that question the authority of the agencies to enforce such conditions or agreements against institution-affiliated parties (IAP) without first establishing that the IAP was unjustly enriched. In addition, the amendment would clarify that a condition imposed by a banking agency in connection with the nondisapproval of a notice, *e.g.*, a notice under the Change in Bank Act, can be imposed and enforced under the FDIA. Finally, the OCC also supports the change to section 18(u) of the FDIA. The amendment enhances safety and soundness by protecting the capital of insured depository institutions.

Sec. 406. Investments by Insured Savings Associations in Bank Service Companies Authorized.

<u>SUMMARY</u>: This section would amend the Bank Service Company Act (12 U.S.C. § 1861, *et seq.*) to allow an insured savings association to be an investor in a bank service company. Under current law, a bank service company must be owned by one or more insured *banks* and, thus, a savings association cannot invest in these entities. In addition, this provision would amend section 5(c)(4)(B) of the Home Owners' Loan Act (HOLA) (12 U.S.C. § 1464(c)(4)(B)) to provide that a Federal savings association may invest in a service company under HOLA if the company is owned by state and Federal *depository institutions*. Under current law, a Federal savings association may invest in a service company under HOLA only if the corporation is organized under the laws of the state in which the association's home office is located and the corporation is owned only by state and Federal *savings associations* having their home offices in such state. Another provision in this bill, Sec. 503, would amend HOLA to eliminate the geographic limits on service companies authorized under that law and, thus, would no longer require that the company must be located in the investors' home state.

<u>OCC COMMENTS</u>: The OCC does not object to section 406, but suggests that if, under section 503, geographic limits on thrift service companies are eliminated, geographic restrictions on bank service companies should similarly be lifted.

Sec. 407. Cross Guarantee Authority.

<u>SUMMARY</u>: This section would amend section 5(e)(9)(A) of the FDIA (12 U.S.C. § 1815(e)(9)(A)) to provide that, for purposes of determining liability of commonly controlled depository institutions for FDIC losses, institutions are commonly controlled if they are controlled by the same company. Under current law, institutions are only commonly controlled if controlled by the same "depository institution holding company." Such a holding company includes only a bank holding company or savings and loan holding company. However, if the subsidiary institution is, for example a credit card bank or a trust company, it is not a "bank" for purposes of the BHCA. Because the holding company is not a bank holding company, there is no cross guarantee liability under current law.

<u>OCC COMMENTS</u>: The OCC supports this amendment, which would correct a gap in the current law to ensure that cross guarantee liability applies equally to any company that controls more than one insured depository institution.

Sec. 408. Golden Parachute Authority and Nonbank Holding Companies.

<u>SUMMARY</u>: This section would amend section 18(k) of the FDIA (12 U.S.C. § 1828(k)) to clarify the FDIC's authority to limit golden parachute payments or indemnification payments made by any company that controls an insured depository institution. Similar to the provision summarized in Sec. 407, current law only applies to "depository institution holding companies."

<u>OCC COMMENTS</u>: The OCC also supports this amendment to correct a gap in the law.

Sec. 409. Amendments Relating to Change in Bank Control.

<u>SUMMARY</u>: This section would amend the Change in Bank Control Act (CBCA) in section 7(j) of the FDIA (12 U.S.C. § 1817(j)) to expand the criteria that would allow a Federal banking agency to extend the time period to consider a CBCA notice. Under the CBCA, a Federal banking agency must disapprove a CBCA notice within certain time frames or the transaction may be consummated. Initially, the agency has up to 90 days to issue a notice of disapproval. The agency may extend that period for up to an additional 90 more days if certain criteria are satisfied and this amendment provides for new criteria that would allow an agency to extend the time period under this additional up to 90-day period. The new criteria that an agency could use to extend the time period can provide the agency more time to analyze the future prospects of the institution or the safety and soundness of the acquiring party's plans to sell the institution or make changes in its business operations, corporate structure, or management. Moreover, the amendment would permit the agencies to use that information as a basis to issue a notice of disapproval.

<u>OCC COMMENTS</u>: The OCC supports this amendment, which is jointly recommended by the Federal banking agencies. This amendment will address issues that have arisen for the banking regulators when a stripped-charter institution (*i.e.*, an insured bank that has no ongoing business operations because, for example, all of the business operations have been merged into another institution) is the subject of a CBCA notice. The agencies' primary concern with such CBCA

notices is that the CBCA is sometimes used as a way to acquire a bank with deposit insurance without submitting an application for a *de novo* charter and an application for deposit insurance. In general, the scope of review of a *de novo* charter application or deposit insurance application is more comprehensive than the statutory grounds for the denial of a notice under the CBCA. There are also significant differences between the application and notice procedures. In the case of an application, the banking agency must affirmatively approve the request before a transaction can be consummated. Under the CBCA, if the Federal banking agency does not act to disapprove a notice within certain time frames, the acquiring person may consummate the transaction. In the case of a CBCA notice to acquire a stripped-charter institution, acquirers are effectively buying a bank charter without the requirement for prior approval and without the scope of review that the law imposes when applicants seek a new charter, even though the risks presented by the two sets of circumstances may be substantively identical. Section 409 expands the criteria in the CBCA that allows a Federal banking agency to extend the time period to consider a CBCA notice so that the agency may consider the acquiring party's business plans and the future prospects of the institution and use that information in determining whether to disapprove the notice.

TITLE VI -- BANKING AGENCY PROVISIONS

Sec. 601. Waiver of Examination Schedule in Order to Allocate Examiner Resources.

SUMMARY: This section would amend section 10(d) of the FDIA (12 U.S.C. § 1820(d)) to provide that an appropriate Federal banking agency may make adjustments in the examination cycle for an insured depository institution if necessary for safety and soundness and the effective examination and supervision of insured depository institutions. Under current law, insured depository institutions must be examined by their appropriate Federal banking agencies at least once during a 12-month period in a full-scope, on-site examination unless an institution qualifies for the 18-month rule. Small insured depository institutions with total assets of less than $250 million and that satisfy certain other requirements may be examined on an 18-month basis rather than a 12-month cycle. The amendment would permit the banking agencies to make adjustments in the scheduled examination cycle as necessary for safety and soundness.

OCC COMMENTS: The OCC supports this amendment. It would give the appropriate Federal banking agencies the discretion to adjust the examination cycle of insured depository institutions to ensure that examiner resources are allocated in a manner that provides for the safety and soundness of insured depository institutions. For example, as deemed appropriate by a Federal banking agency, a well-capitalized and well-managed bank's examination requirement for an annual or 18-month examination could be extended if the agency's examiners were needed to immediately examine troubled or higher risk institutions. This amendment would permit the agencies to use their resources in the more efficient manner.

Sec. 602. Interagency Data Sharing.

<u>SUMMARY</u>: This section would amend the FDIA (12 U.S.C. § 1811, *et seq.*). The amendment would provide that a Federal banking agency has the discretion to furnish any confidential supervisory information, including a report of examination, about a depository institution or other entity examined by the agency to another Federal or state supervisory agency and to any other person deemed appropriate. Similar changes are also made to the Federal Credit Union Act.

<u>OCC COMMENTS</u>: The OCC supports this provision. This provision will give the other Federal banking agencies parallel authority to share confidential information that was given to the FRB in Sec. 727 of the Gramm-Leach-Bliley Act (GLBA). We note, however, that this provision is discretionary and nothing in this provision would compel a banking agency to disclose confidential supervisory information that it has agreed to keep confidential pursuant to an information sharing or other agreement with another supervisor. *See also* Sec. 610.

Sec. 603. Penalty for Unauthorized Participation by Convicted Individual.

<u>SUMMARY</u>: This section would amend section 19 of the FDIA (12 U.S.C. § 1829) to give the Federal banking agencies the authority to prohibit a person convicted of a crime involving dishonesty, breach of trust, or money laundering from participating in the affairs of an uninsured national or state bank or uninsured branch or agency of a foreign bank without the consent of the agency. Under current law, the ability to keep these bad actors out of depository institutions applies only to *insured* depository institutions. Sec. 611 also would amend 12 U.S.C. § 1829 to give the FRB the authority to keep persons convicted of these offenses from participating in the affairs of a bank holding company or its nonbank subsidiaries, or an Edge or Agreement corporation.

<u>OCC COMMENTS</u>: The OCC supports these changes to the law. This amendment will help to provide for the safe and sound operations of uninsured, as well as insured, institutions. We recommend, however, that the provision be clarified so that the Federal banking agencies also may prevent a person convicted of such offenses from participating in the affairs of nonbank subsidiaries of depository institutions.

Sec. 604. Amendment Permitting the Destruction of Old Records of a Depository Institution by the FDIC After the Appointment of the FDIC as Receiver.

<u>SUMMARY</u>: This provision would amend section 11(d)(15)(D) of the FDIA (12 U.S.C. § 1821(d)(15)(D)) to modify the record retention requirement of old records that must be maintained by the FDIC after a receiver is appointed for a failed insured depository institution. Under current law, the FDIC must preserve all records of a failed institution for six years from the date a receiver is appointed. This requirement is not dependent on the actual age of the records at the time the receiver is appointed. After the six-year period, the FDIC may destroy any unnecessary records, unless directed to retain the records by a court or a government agency or otherwise prohibited from destroying the records by law. The amendment would permit the

FDIC to destroy unnecessary records that are 10 or more years old on the date the receiver is appointed unless prohibited from doing so by a court, a government agency, or law.

OCC COMMENTS: The OCC supports this change and recommends that a similar provision be included in national banking law. The OCC appoints receivers for all national banks, both insured and uninsured. The FDIC only is required to accept the appointment for insured national banks. Thus, a receiver for an uninsured national bank would not be the FDIC. Adding a similar provision to national banking law also would clarify for a receiver of a national bank, other than the FDIC, that these outdated records may be destroyed.

Sec. 605. Modernization of FDIC Recordkeeping Requirement.

SUMMARY: This section would amend section 10(f) of the FDIA (12 U.S.C. § 1820(f)) to provide that the FDIC may retain records in electronic or photographic form and that such documents shall be deemed to be an original record for all purposes, including as evidence in court and administrative proceedings.

OCC COMMENTS: The OCC supports this amendment and recommends that it be expanded to apply to all of the Federal banking agencies.

Sec. 606. Clarification of Extent of Suspension, Removal, and Prohibition Authority of Federal Banking Agencies in Cases of Certain Crimes by Institution-Affiliated Parties.

SUMMARY: This provision would amend section 8(g) of the FDIA (12 U.S.C. § 1818(g)) to clarify that the appropriate Federal banking agency may suspend or prohibit IAPs charged with or convicted of certain crimes (including those involving dishonesty, breach of trust, or money laundering) from participating in the affairs of any depository institution and not only the institution with which the party is or was last affiliated. The amendment would also clarify that the section 8(g) authority applies even if the IAP is no longer associated with any depository institution at the time the order is considered or issued or the depository institution with which the IAP was associated is no longer is existence.

Under current law, if an IAP is charged with such a crime, the suspension or prohibition will remain in effect until the charge is finally disposed of or until terminated by the agency. If the individual is convicted of such a crime, the party may be served with a notice removing the party from office and prohibiting the party for further participating in the affairs of a depository institution without the consent of the appropriate Federal banking agency. Before an appropriate Federal banking agency may take any of these actions under section 8(g), the agency must find that service by the party may pose a threat to interests of depositors or impair public confidence in a depository institution. The statute further provides that an IAP that is suspended or removed under section 8(g) may request a hearing before the agency to rebut the agency's findings. Unless otherwise terminated by the agency, the suspension or order of removal remains in effect until the hearing or appeal is completed. Current law, however, applies only to the depository institution with which the IAP is associated. Similar amendments are made to the Federal Credit Union Act.

OCC COMMENTS: The OCC supports the amendment to the FDIA. This amendment will help to ensure that, if a Federal banking agency makes the required findings, the agency has adequate authority to suspend or prohibit an IAP charged with or convicted of such crimes from participating in the affairs of any depository institution.

Sec. 607. Streamlining Depository Institution Merger Application Requirements.

SUMMARY: This section would amend the Bank Merger Act (BMA) (12 U.S.C. § 1828(c)). The amendment would provide that the responsible agency in a merger transaction, which is generally the Federal banking agency that has the primary regulatory responsibility for the resulting bank, must request a competitive factors report only from the Attorney General, with a copy to the FDIC. Under current law, this report must be requested from all of the other Federal banking agencies but the other agencies are not required to file a report.

OCC COMMENTS: The OCC supports this amendment. It appropriately streamlines the agencies' procedures in processing BMA transactions.

Sec. 608. Inclusion of Director of the Office of Thrift Supervision in List of Banking Agencies Regarding Insurance Customer Protection Regulations.

SUMMARY: This provision would amend section 47(g)(2)(B)(i) of the FDIA (12 U.S.C. § 1831x(g)(2)(B)(i)) to add OTS to the list of the Federal banking agencies that must jointly make certain determinations before certain state customer protection laws may be preempted. Under current law, OTS is one of the Federal banking agencies that are required to adopt the Federal regulations that would provide the basis for the preemption determination but is not included in the list of agencies that must make the preemption determination.

OCC COMMENTS: The OCC does not object to this provision.

Sec. 609. Shortening of Post-Approval Antitrust Review Period with the Agreement of the Attorney General.

SUMMARY: This provision would amend section 11(b)(1) of the BHCA (12 U.S.C. § 1849(b)(1)) and section 18(c)(6) of the BMA (12 U.S.C. § 1828(c)(6)) to permit the shortening of the post-approval waiting period for certain bank acquisitions and mergers. Under current law, the post-approval waiting period generally is 30 days from the date of approval by the appropriate Federal banking agency. The waiting period gives the Attorney General time to take action if the Attorney General determines that the transaction will have a significant adverse effect on competition. The waiting period under both the BHCA and BMA, however, may be shortened to 15 days if the appropriate banking agency and the Attorney General agree that no such effect on competition will occur. The proposed amendment would shorten the mandatory 15-day waiting period to 5 days.

OCC COMMENTS: The OCC supports this change. It will give the banking agency and the Attorney General more flexibility to shorten the post-approval waiting period as appropriate for those transactions that do not raise competitive concerns. If such concerns exist, the 30-day waiting period will continue to apply. This change will not affect the waiting periods for transactions that involve bank failures or emergencies. In those cases, the statute already provides for other time frames.

Sec. 610. Protection of Confidential Information Received By Federal Banking Regulators from Foreign Banking Supervisors.

SUMMARY: This section would amend section 15 of the IBA (12 U.S.C. § 3109) to add a provision that ensures that the FRB, OCC, and FDIC cannot be compelled to disclose information obtained from a foreign supervisor if public disclosure of this information would be a violation of foreign law and the U.S. banking agency obtained the information pursuant to an information sharing arrangement with the foreign supervisor or other procedure established to administer and enforce the banking laws. The banking agency, however, cannot use this provision as a basis to withhold information from Congress or to refuse to comply with a valid court order in an action brought by the U.S. or the agency.

OCC COMMENTS: The OCC supports this provision. This amendment would provide assurances to foreign supervisors that the banking agencies cannot be compelled to disclose publicly confidential supervisory information that the agency has committed to keep confidential, except under the limited circumstances described in the amendment. This authority is similar to the authority provided to the Securities and Exchange Commission under the securities laws (15 U.S.C. § 78q(h)(5)). Some foreign supervisors have been reluctant to enter into information sharing agreements with U.S. banking agencies because of concerns that the U.S. agency may not be able to keep the information confidential and public disclosure of the confidential information provided could subject the supervisor to a violation of its home country law. This amendment will be helpful to ease those concerns and will facilitate information sharing agreements that enable U.S. and foreign supervisors to obtain necessary information to supervise institutions operating internationally.

Sec. 611. Prohibition on the Participation in the Affairs of Bank Holding Company or Edge Act or Agreement Corporations by Convicted Individual.

SUMMARY: This section also would amend section 19 of the FDIA (*see also* Sec. 603). It will give the FRB the authority to prohibit a person convicted of an offense involving dishonesty, breach of trust, or money laundering from participating in the affairs of a bank holding company, its nonbank subsidiaries, or an Edge or Agreement Corporation without the consent of the FRB.

OCC COMMENTS: The OCC supports expanding the banking agencies' authority to keep bad actors out of our financial firms. We recommend, however, that the provision be clarified so that the Federal banking agencies may prevent persons convicted of such offenses from participating in the affairs of nonbank subsidiaries of depository institutions.

Sec. 612. Clarification that Notice After Separation from Service May be Made by an Order.

SUMMARY: This section would amend section 8(i)(3) of the FDIA (12 U.S.C. § 1818(i)(3)) to clarify that, when a Federal banking agency takes an enforcement action against an IAP who has resigned or is otherwise separated from an insured depository institution, the agency can take such action by notice or issuing an order.

OCC COMMENTS: The OCC supports this technical clarification to the law. Enforcement actions under 12 U.S.C. § 1818 generally provide that actions against IAPs can be taken in the form of a notice or an order and this amendment clarifies that the same is true for actions against IAPs under this provision of § 1818.

Sec. 613. Examiners of Financial Institutions.

SUMMARY: This section would amend sections 212 and 213 of title 18 of the United States Code (18 U.S.C. §§ 212, 213). Current law provides that criminal penalties may be imposed on a Federal bank examiner who examines a bank from which the examiner receives an extension of credit, including a credit card issued by that institution. The financial institution that extends such credit to the examiner also is subject to criminal penalties. The amendment would provide that the Federal financial institutions regulatory agencies, including the Federal banking agencies, may grant exemptions from the prohibition in the law to their examiners by regulation or on a case-by-case basis if an extension of credit would not likely affect the integrity of the examination. The agencies must consult with each other in developing regulations providing for the exemptions and case-by-case exemptions only may be granted after considering certain specific factors. In addition, the amendment expressly provides that examiners may obtain any credit card without disqualification or recusal, but subject to the safeguard that the cards must be issued under the same terms and conditions as cards issued to the general public.

OCC COMMENTS: The banking agencies worked together to develop this amendment. Current law limits the flexibility of the OCC and the other banking agencies to assign examiners to particular institutions or examination teams, even if the extension of credit is on the bank's customary terms and the examiner's skills or expertise would contribute materially to the examination. This amendment would clarify and update the law to permit the agencies to grant appropriate exemptions to the prohibition on extending credit while continuing to ensure that the integrity of our examiners is not compromised.

Sec. 614. Parity in Standards for Institution-Affiliated Parties.

SUMMARY: This section would amend section 3(u)(4) of the FDIA (12 U.S.C. § 1813(u)(4)) to remove the "knowing and reckless" requirement to hold independent contractors to a standard that is more like the standard that applies to other IAPs. Under current law, independent contractor IAPs are treated more leniently under the enforcement provisions in the banking laws than are directors, officers, employees, controlling shareholders, or even agents for the institution or shareholders, consultants, and joint venture partners who participate in the affairs of the institution. To establish that an independent contractor, such as an accountant, has the type of relationship with the insured depository institution that would allow a Federal banking agency to take action against the accountant as an IAP for a violation of law, breach of fiduciary duty, or an unsafe or unsound banking practice, the banking agency must show that the accountant "knowingly and recklessly" participated in such a violation. This amendment would strike the "knowing and reckless" requirement.

OCC Comments: The Federal banking agencies jointly recommend this amendment. The knowing and reckless standard in the current law is so high that it is extremely difficult for the banking agencies to take enforcement actions against accountants and other contractors who engage in wrongful conduct. The amendment will strengthen the agencies' enforcement tools with respect to accountants and other independent contractors.